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IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:

) No. R-14-0010

)

) **COMMENT OF ARIZONA**

Petition to Amend Rules 31.2, 31.4,
31.13, 32.4, and 32.9, Ariz.R.Crim.P.

) **ATTORNEYS FOR CRIMINAL**

) **JUSTICE REGARDING PETITION**

) **TO AMEND RULES 31.2, 31.4,**

) **31.13, 32.4, AND 32.9,**

) **ARIZ.R.CRIM.P.**

)

)

Pursuant to Rule 28 of the Arizona Rules of Supreme Court, Arizona Attorneys for Criminal Justice (“AACJ”) submits the following comment to the above-referenced petition and urges the Court to reject the proposed rule changes. AACJ, the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 in order to give a voice to the rights of the criminally accused and to those attorneys who defend the accused. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the

courts and in the legislature, promoting excellence in the practice of criminal law through education, training, and mutual assistance, and fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

AACJ co-signed the comment filed by the Federal Public Defender's Office – District of Arizona ("FPD") on June 13, 2014, and re-affirms its support for that comment. AACJ also agrees with the FPD's comment filed on April 13, 2014, and with the comments filed by the State Bar of Arizona on April 15, 2014, and January 9, 2015. This comment will endeavor to avoid unnecessary repetition but will focus on responding to the Court's request to provide information regarding unitary-review systems similar to that proposed in the petition.

Discussion

The petition filed by the Arizona Attorney General's capital litigation division is clearly a response to the United States Supreme Court's decision in *Martinez v. Ryan*, 132 S.Ct. 1309 (2012). The principle underlying that decision is that a defendant ought to have a thorough review of his convictions and sentences. That fundamental principle, however, has been forgotten in the various efforts of the Attorney General's Office to "remedy" the problem it sees in *Martinez*. It should not be forgotten by this Court. The current system for reviewing capital sentences may not be perfect, but the unitary review proposed by the Attorney General's Office goes in the wrong direction.

1. This Court's timely direct review in capital cases is valuable and necessary to the administration of justice

The petition seeks to eliminate an entire stage of review by this Court for capital convictions and sentences. Under the current rules, after conviction and sentencing, a defendant may appeal directly to this Court. If the Court affirms the conviction and sentence, the defendant enters into post-conviction proceedings, which may end in review by this Court. This Court's timely direct review in capital cases is valuable for several reasons.

First, two stages of review allow the parties and the courts to focus on the distinct issues raised at each stage. On direct appeal, review focuses on trial errors (including errors by the trial judge or prosecutor). In post-conviction proceedings, review focuses on errors outside the trial record (including errors by defense counsel). Collapsing this review into one proceeding would dilute the attention paid to these different types of error and would certainly make diligent and capable representation of capital defendants more difficult.

Second, although a unitary-review system *might* speed the process, it would also remove any state-court review for ineffective assistance of appellate counsel. In its original petition, the Attorney General's Office acknowledges that "[t]his Court could provide an additional state-court proceeding to raise claims of appellate counsel's ineffectiveness," but suggested that even that would not be necessary because it "is willing to forgo the benefit of deference in federal court" *Original*

Petition at 13-14. This position is at odds with the United States Supreme Court’s repeatedly-expressed preference for federal courts to review a fully-developed state-court record. *See, e.g., Harrington v. Richter*, 131 S.Ct. 770, 787 (2011) (“the basic structure of federal habeas jurisdiction [is] designed to confirm that state courts are the principal forum for asserting constitutional challenges to state convictions”). Ironically, while the Attorney General’s Office is no doubt displeased about the number of remands in the wake of *Martinez*, adopting its proposed rule change will inevitably result in more orders from federal courts that Arizona courts must review constitutional claims – or that our courts must grant relief from convictions or sentences.

Third, this Court’s direct review *does* result in the correction of constitutional error, contrary to the Attorney General’s belief that “reversal in capital cases on direct appeal is exceedingly rare.” *Original Petition* at 11-12. Only last month this Court reversed a murder conviction (resulting in reversal of a death sentence, as well). *State v. Ketchner*, No. CR-13-0158-AP, 2014 WL 7180242 (Ariz. Dec. 18, 2014). Had unitary review been in place, a considerable post-conviction investigation and proceeding would have been wasted. The original petition correctly cites several examples of relief being granted as to a conviction or sentence by this Court in capital cases just in the last few years. AACJ sees value in this

Court's timely direct review of capital cases, even if the Attorney General's Office does not.

2. Unitary review could bring ancillary litigation and disputes over ethical conduct between counsel, but at the least it would certainly increase the number of defense teams for a capital defendant

The FPD's June 2014 comment, which AACJ co-signed, provided examples from unitary-review jurisdictions of lawsuits filed by trial or appellate counsel against post-conviction counsel to prevent disclosure of attorney-client privileged information in post-conviction proceedings that would have a deleterious effect on the direct appeal. In response, the Attorney General's Office expresses a clear lack of care for this issue, choosing to focus on what it considers to be "an unnecessarily complicated hypothetical." *Reply* at 4-5.

The Attorney General's Office, however, fails to address a very real situation that happens in Arizona all the time. The trial court usually appoints the Public Defender (or another public defender agency such as the Legal Defender or the Legal Advocate) to represent the defendant at trial. After conviction, that public defender agency remains as counsel for the defendant on appeal; because the defendant may not raise ineffective-assistance-of-trial-counsel claims on direct appeal, the same office may represent the defendant in the direct appeal. If this Court affirms the convictions and sentences, only then would a new attorney be appointed to represent the defendant in post-conviction proceedings.

If the Attorney General's proposed rule change is adopted, the agency that represented the defendant at trial will not be able to provide conflict-free representation on appeal because the defendant will likely have to raise ineffective-assistance-of-counsel claims against that agency. Thus, the proposed unitary-review system would require three sets of counsel, whereas the current system requires only two.

Furthermore, even if unitary review did not invite a host of ethical issues raised by different sets of counsel protecting various of the defendant's interests, it clearly would increase the cost of defending those who have been sentenced to death. One of the issues raised in the petition is the cost of litigation. The Attorney General's Office has apparently failed to consider that its proposed unitary review would require three sets of defense counsel, which will be more expensive than two sets of defense counsel. The petition rightly discusses this issue only briefly, presumably because it recognizes that cost cannot be a primary concern when the government is imposing the ultimate punishment. *Amended Petition* at 19. Nonetheless, the need for more capital defense attorneys clearly cuts against the hope of cost savings.

Conclusion

There is no perfect system for review of capital convictions and sentences, but Arizona's current rules provide adequate procedural protections. The Attorney General's proposed unitary-review regime would undermine those protections. AACJ asks the Court to reject the petition.

RESPECTFULLY SUBMITTED this 16th day of January, 2015.

ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE

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